

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 16 OF 13TH FEBRUARY OF 2017

BETWEEN

**BABS SECURITY SERVICES LTD.....APPLICANT
AND**

CHUKA UNIVERSITY..... PROCURING ENTITY

Review against the decision of Chuka University in the matter of Tender No. CU/OPNT/50/2016-2017 Provision of Security Services.

The Board conducted a hearing in its boardroom on 1st March 2017.

BOARD MEMBERS PRESENT

1. Mrs. Josephine Mong'are - Chairperson
2. Weche Okubo - Member
4. Mrs Gilda Odera - Member
5. Mr. Paul Ngotho - Member

IN ATTENDANCE

- Philemon Kiprop - Holding Brief for Secretary
Eveleyne Abuga - Secretariat

PRESENT BY INVITATION

Applicant - BABS Security Services Limited

- Vincent O. Nyangayo - Advocate, Swan Advocates
Fred Osoro - Clerk
Samuel Mureithi - Director, Babs Security

Procuring Entity - Chuka University

Ng'ania Melissa	- Advocate, Brian Otieno & Co. Advocate
Brian Otieno	- Advocate, Brian Otieno & Co. Advocate
Micheal Otieno	- Advocate, Brian Otieno & Co. Advocate
Prof. Erastus N. Njoka	- Vice Chancellor
Naftal O. Oenga	- Procurement Officer
Prof. S. M. Kagwanja	- DVC (Ad)

Interested Parties

Ogututu O. Schonn	- Advocate, Pelt Security Services
Andrew Nzioka	- Pupil

BACKGROUND OF AWARD

INTRODUCTION

Chuka University advertised for a tender for provision of security services in the Daily Nation and Standard Newspaper on 21st October 2016. The tenders were closed/opened on 8th November, 2016. The evaluation was done in four stages; Preliminary, technical, financial and Due diligence.

PRELIMINARY EVALUATION

The 15 (Fifteen) bidders which responded to the tender were coded (B1 to B15) and subjected to Preliminary Evaluation. Only seven (7) bidders met all the requirements at this stage and proceeded to Technical Evaluation.

TECHNICAL EVALUATION

The seven (7) bidders were subjected to Technical Evaluation. All of them scored 49 and above (out of 70) and qualified for the Financial Evaluation.

FINANCIAL ANALYSIS

The financial evaluation and ranking (from the lowest to the highest on their quoted tender sum) of the seven (7) bidders was as shown below:

Table 1: Financial analysis:

	NAME AND COMPANY AND ADDRESS	BID BOND	TENDER SUM	RANK
B11	BABS Security Services Limited P.O Box 4380 - City Square Nairobi	100,000 Family Bank	A- 13,000 B- 13,000 C- FREE TOTAL KES- 26,000.00	1
B14	Pelt Security Services P.O Box 149-60200 Nairobi	100,000 Credit Bank	A- 12,500 B- 12,500 C- 20,000 TOTAL KES- 45,000.00	2
B4	SAMO Security Limited P.O Box 60862, Nairobi	100,000 Equity Bank	A- 13,500 B- 13,500 C- 40,000 TOTAL KES- 67,000.00	3
B9	Cobra Security Company Limited P.O Box 2779, 00506, Nairobi	100,000 Equity Bank	A- 17,400 B- 17,400 C- 35,380 TOTAL KES- 70,180.00	4
B13	Boby Guards Limited P.O Box 348, GPO Nairobi	100,000 Credit Bank	A- 13,000 B- 13,000 C- 50,000 TOTAL KES- 76,000.00	5
15	Bedrock Holdings Limited P.O Box 1004-40100 Kisumu	100,000 Credit Bank	A- 19,720 B- 19,720 C- 81,200 TOTAL KES- 120,640.00	6
8	Hatari Security Guard P.O Box 2291-00100, Nairobi	100,000 Credit Bank	A- 20,880 B- 20,880 C- 88,160 TOTAL KES- 129,920.00	7 7

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KEY:

A- Is the Cost of providing one un-armed day guard per month

B- Is the Cost of providing one un-armed night guard month

C- Is the Cost of providing two appropriate security dogs per month

The Evaluation Committee noted that:

(i) BABS Security Services Ltd did not quote any price for provision of two security dogs. The committee doubted that the firm could provide quality

security services for free owing the fact that all the other bidders had priced the dogs.

(ii) The firm is currently providing security services in the University and there are complaints from Chuka University concerning service delivery.

RECOMMENDATION

Based on the tender evaluation process, M/s BABS Security Services Limited was the lowest evaluated bidder for the tender and so the committee recommended that due diligence be conducted on the firm before the tender is awarded. This is in line with s. 83 of the Public Procurement and Asset Disposal Act 2015 ("the Act").

PROFESSIONAL OPINION

The Head of Procurement concurred with the Committee that due diligence should be carried out on the Applicant.

DUE DILIGENCE

The committee adopted an 8-point criteria, which it applied during its visit to the Applicant. It made the following observations:

- i) The firm had accessible offices/workstations located along the highway with visible signage.
- ii) The offices were well furnished with office facilities and equipment
- iii) The firm had the necessary legal and statutory documents apart from the membership certificate of Kenya Industry Association which had expired on 31st December 2016 and the firm had applied for renewal.

- iv) The firm pays the guards according to the government policy on minimum wage/salary and this was seen from their printed payroll for October 2016
- v) However, it was difficult to ascertain the qualifications of personnel because the personnel files only contained the C.V's of individual staff. One file contained a certificate from Makerere University, but it was not clear to the committee on the type of training because it was illegible.
- vi) There was no proof for continuous training of guards as was indicated in the technical criteria of the tender document. The committee noted that one training was conducted for 8 guards from 3rd to 27th November, 2015 an indication that the firm had trained few guards as opposed to seven (7) trainings as required in the bid document.
- vii) There was no clear proof of ownership of the firm's vehicles because as explained to the committee most of the log books could not be availed to the committee because they had been used as collateral in the bank.
- viii) The Committee observed that the firm had worked with Chuka University for a period of two years and the user department have expressed a lot of dissatisfaction of their services. Some of the complaints expressed include:
 - (a) Absenteeism by some of the guards in their duty stations
 - (b) Lack of professional competence in discharging their duties as security guards

(c) The guards often complaint of delayed salary from their employer and lack of proper security uniform

(d) Poor supervision by their supervisors.

(e) Lack of discipline i.e drunkenness during working hours

(f) There is a case that some of their guards were involved in stealing motor vehicle spare parts at Chuka University and the matter is before the Chuka Law Courts.

(g) Complaints from Chuka District Hospital that BABS Security guards had been colluding with patients to let them discharge illegally through the back door at odd hours. (A case at law courts)

RECOMMENDATION

The Committee concluded that the Applicant could not offer security services effectively at Chuka University due to the reasons stated above and recommended award to the second lowest evaluated bidder, M/s Pelt Security Services at a tender at the rate of KES 45,000.00 per month for one un-armed guard for both day and night and provision of two appropriate security dogs per month.

2ND PROFESSIONAL OPINION AFTER DUE DILIGENCE

The Head of Procurement presented his opinion in a memo to the Accounting Officer dated 8th February, 2016 recommending award to Messrs Pelt Security Services at the above rate.

THE REQUEST FOR REVIEW

The Request for Review was lodged by M/s BABS Security Services Ltd on 13th February, 2017 seeking the following orders:

- a) Pending the hearing and determination of this reference the current security service providers to the Respondent be maintained and any award to the successful tenderer be suspended.
- b) The Respondent's decision notifying the Applicant that it has not been successful for the tender be set aside.
- c) The Respondent's decision awarding the tender to an undisclosed Tenderer be set aside and nullified.
- d) Further, the Respondent be ordered to conduct a fresh/new procurement process for the tender.
- e) The Respondent be ordered to pay the costs of and incidental to these proceedings; and
- f) Such further relief or alternative relief as this board shall deem just and expedient.

PARTIES ARGUMENTS

The applicant was represented by Mr. Vincent Nyangayo Advocate while the procuring entity was represented by M/s Ngánia Melissa Advocate. The interested party was represented by Mr. Ogutu O. Schonn Advocate holding brief for Mr. Mureithi.

During the hearing, Counsel for the Applicant relied on his application dated 13th February, 2017 together with the affidavit dated the same date and a further affidavit dated 27th February, 2017. Counsel for the Applicant submitted that the procuring entity violated the provisions of Sections 87(3),

Section 167, 168, 170, 171, 173 and 183 and Regulations 1 and 8 of the third schedule of the Public Procurement and Asset Disposal Act 2015.

It was the Applicant's position that the tender document required the procuring entity to communicate to the successful tenderer and the unsuccessful tenderers of the outcome of their tenders via registered mail and Section 87 of the Act clearly provided as to what such communication should have contained together with the reasons why the bidders were not successful. On the issue of conducting a due diligence counsel for the Applicant contended that they were called and informed that the procuring entity was thirty minutes away from the Applicant's premises and they were going to visit their premises. He further contended that the Applicant was never informed of the intended visit nor the reason for conducting such a visit.

In response to the issues raised by the procuring entity that the Applicant was in breach of the provisions of the initial contract between the Applicant and the Respondent/the Procuring entity, Counsel for the Applicant averred that the initial contract provided for remedies of what should happen in case any party was in breach. It was his assertion that despite the claim, the procuring entity never took action against the Applicant. He averred that no meetings were ever called to discuss the same. While addressing the issue of theft of computer parts in the library and loss of laptops from the Respondent's office and also the loss of timber and offcuts, Counsel for the Applicant stated that there was no any report made to any police station because issues of theft are criminal in nature. He submitted that these allegations were made to paint the applicant in bad light.

While responding to the issue raised by the Respondent/the Procuring entity that the Applicant was guilty of non-remittance of statutory deductions,

Counsel for the Applicant averred that the Applicant submitted compliance certificates from NSSF and NHIF as required by the tender document.

He further averred that the Respondent/the procuring entity is required under the law to seek clarification by calling the tenderer and requesting for clarification. It was his assertion that the Respondent/the procuring entity did not seek clarification but rather proceeded to get documents which it alleged showed that the Applicant was not compliant in the remittance of statutory deduction to the relevant authorities.

Counsel for the Applicant therefore urged the Board to grant the prayers sought and nullify the award of the tender to the interested party herein.

M/s Ngania who appeared for the procuring entity opposed the Request for Review and relied on the replying affidavit sworn by Pro. E. N. Njoka on 28th February, 2017 together with the annexures thereto. She stated that the Applicant had not demonstrated sufficient grounds to warrant the review of the tender process because the procuring entity had conformed with the provisions of the Act. She averred that the procedures requiring advertisement were complied with as per the newspaper annexed at pages 1 and 2 of Pro. Njoka's replying affidavit.

Counsel for the procuring entity stated that whereas the notification given to the Applicant did not contain reasons as required under Section 87(3) of the Act, this was however not a sufficient reason to warrant the annulment of the procurement process. Counsel for the procuring entity stated that despite the Applicant emerging as the lowest bidder, the procuring entity had to perform due diligence as provided for under Section 83 of the Act.

Counsel for the procuring entity further stated that the procuring entity needed a Tax Compliance Certificate from the Kenya Revenue Authority in

order to pass the test for compliance. She submitted that the Applicant had not made out a case to warrant the Board to disturb the tender process.

Mr. Ogutu on behalf of the successful bidder opposed the Request for Review and associated himself with the submissions made by Counsel for the Respondent. He averred that the interested party was awarded the tender based on the recommendation report prepared after due diligence was done. Counsel for the interested party cited the provisions of Section 83 of the Act and was of the view that the said Section is clear on the manner in which due diligence was to be undertaken. He was of the view that since the Act does not specify the parameters or the manner in which due diligence was to be done, then it was upon the procuring entity to determine how it would conduct the due diligence. He urged the Board not to disturb the award of the tender made to his client.

THE BOARD'S DECISION

The Board has considered the Applicant's Request for Review and the responses thereto and finds that this Request for Review raises two issues for determination namely:-

- i) Whether the procuring entity erred in conducting due diligence on the Applicant.**
- ii) Whether the Applicant was notified of the outcome of it's tender and whether the letter of notification was proper.**

ISSUE NO. I

Whether the procuring entity erred in conducting due diligence on the Applicant.

On the first issue framed for determination, Section 83 of the Public Procurement and Asset Disposal Act which deals with the issue of due diligence states as follows:-

Section 83(1)An evaluation committee may, after tender evaluation, but prior to the award of the tender, conduct due diligence_and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act.

The Board finds that whereas the provisions of Section 83(1) of the Act gives the procuring entity the leeway to conduct due diligence, the requirement for conducting due diligence was not provided for as part of the evaluation criteria set out in tender document. The Board further finds that whereas the procuring entity conducted due diligence on the Applicant it did not extend the same treatment to the successful bidder.

In the absence of such a criteria in the tender document and the fact that bidders were accorded different treatment, the Board finds that the procuring entity breached the provisions of Section 80 of the Act and Article 227 of the Constitution and this ground of review is therefore allowed.

ISSUE NO. II

Whether the Applicant was notified of the outcome of it's tender and whether the letter of notification was proper.

On the issue of notification, the Board finds that under the Provisions of Section 87(1) and (3) of the Act the law requires that both the successful and the unsuccessful bidders be notified of the outcome of their tenders at the same time and that the letter of notification to the unsuccessful bidders

should contain the reasons as to why their tenders were unsuccessful. The Act also requires that the letter of notification to the unsuccessful bidder should disclose the name of the successful bidder.

The Board has perused the documents placed before it and finds that a letter of regret dated 8th February, 2017 was sent to the Applicant within the tender validity period but the same did not contain sufficient reasons and did not also contain the particulars of the successful bidder as required by the law.

The Board however finds that the Applicant did not suffer any prejudice as it was able to file it's Request for Review within time.

This ground of the Applicant's Request for Review is therefore disallowed.

Consequently, this Request for Review ultimately succeeds on the basis of the Board's findings on issue number 1 above and the Board makes the following orders on this Request for Review.

FINAL ORDERS

In view of all the above findings, the Board, in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, 2015, hereby allows the Request for Review No. 16/2017 of 13th February 2017 for Tender No. CU/OPNT/50/2016-2017 Provision of Security Services and gives the following orders:

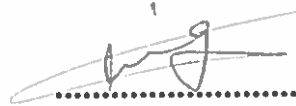
- a) **The Procuring Entity's decision to award the tender to the Successful Bidder is hereby annulled and is set aside.**
- b) **As costs follow the event the Applicant is awarded the costs of filing the Request for Review plus costs of Kshs. 100,000/= inclusive of VAT and disbursements.**

- c) The Procuring Entity shall present proof of the payment of the above costs to the Board on or before 20th March 2017.
- d) The Procuring Entity shall re-tender for the procurement of the subject services on or before 27th March 2017 using the tender document in their current form or as amended and the tender document shall take into account the remarks made by the Board in this decision and any other reasonable amendments.

Dated at Nairobi on this 6th day of March, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB