

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPEAL NO.53/2023 OF 3RD AUGUST, 2023

BETWEEN

PRIDE KINGS SERVICES LTD.....APPLICANT

AND

THE ACCOUNTING OFFICER,

THE KISII NATIONAL POLYTECHNIC.....1ST RESPONDENT

THE KISII NATIONAL POLYTECHNIC2ND RESPONDENT

Review against the decision of the Accounting Officer- Public Service, Kisii County Government in relation to Tender No. **KNP/T/19/2023-2024/5** for Provision of Security Services.

BOARD MEMBERS PRESENT

- | | | |
|------------------------|---|-------------|
| 1. Mr. George Murugu | - | Chairperson |
| 2. Ms. Alice Oeri | - | Member |
| 3. Mr. Alexander Musau | - | Member |
| 4. Mr. Daniel Langat | - | Member |
| 5. Dr. Paul Jilani | - | Member |

IN ATTENDANCE

- | | | |
|-----------------------|---|-------------|
| 1. James Kilaka | - | Secretariat |
| 2. Philemon Chemoiywo | - | Secretariat |

PRESENT BY INVITATION

APPLICANT

PRIDE KINGS SERVICES LTD

Mrs. Chepkemboi- Advocate - Chepkemboi Phyllis & Associates



RESPONDENTS

THE ACCOUNTING OFFICER, THE KISII NATIONAL POLYTECHNIC & THE KISII NATIONAL POLYTECHNIC

Mr.Nyariki- Advocate

-Nyariki & Co. Advocates

INTERESTED PARTY

Mr.Mogire- Advocate

-M/S Ombuhi K. Mogire & Co. Advocates

BACKGROUND OF THE DECISION

The Tendering Process

This was an open tendering process invited through the daily newspaper's advertisement on 16th May, 2023. Bid Document was to be downloaded for free from Kisii National Polytechnic website www.kisiipoly.ac.ke. The Advert was pursuant to Section 96 (2) of the Public Procurement and Asset Disposal Act, 2015. The bids submission deadline was scheduled to close and opened on 30th May, 2023 at 11.00am.

Submission of Tenders and Tender Opening

Tender Opening

At the deadline for tender submission, the following bids were received;

T1	Quick Diplomatic Response Security Ltd
T2	Gimo Security & Investigation Services Ltd
T3	Keyforce Security Group Ltd
T4	Legit Securities Ltd
T5	Pride Kings Services
T6	Simple safe Security Services
T7	Gifted Hands International

Evaluation of Tenders

In accordance with tender evaluation guidelines in the tender document, the evaluation was based on the following stages: -

- 1) Preliminary Evaluation
- 2) Technical Evaluation
- 3) Financial evaluation

(A) PRELIMINARY EVALUATION STAGE

The evaluation criteria set out in the tender document for this category was as in the table below. Each bid was evaluated by use of the given criteria.

	CRITERIA	T1	T2	T3	T4	T5	T6	T7
1	Certificate of incorporation/Registration	R	R	R	R	R	R	R
2	CR12 where applicable produced in the last 6 months	R	R	R	NR	R	NR	NR
3	Power of attorney	NR	NR	R	NR	R	NR	NR
4	Valid tax compliance	R	NR	R	R	R	NR	NR
5	Dully filled, signed and stamped price schedule	R	R	R	R	R	R	R
6	Original bid bond of Kshs 110,000 from a reputable bank	NR	R	R	R	R	NR	NR
	Guarantee for 150 days from the closing date of tender	NR	R	R	R	R	R	R
7	Filled and signed form of tender with bid validity of 120 days	R	NR	R	NR	R	R	R
8	Filled and stamped confidential business questionnaire form.	R	R	R	R	R	NR	R
9	Dully filled, signed and stamped certificate of independent tender determination	R	R	R	R	R	R	NR
10	Dully filled, signed and stamped SD 1 and SD 2 forms	R	R	R	R	R	R	R
11	Dully filled, signed and stamped declaration and commitment to the code of ethics for persons participating in PPAD	R	R	R	R	R	R	R

12	Copy of NSSF compliance certificate	R	R	R	R	R	NR	R
13	Copy of NSSF compliance certificate	R	R	R	R	R	NR	R
14	Audited financial statements for the last 3 years	NR	NR	R	R	R	NR	NR
15	Bank account information including a reference letter from their bank	R	NR	R	R	R	NR	NR
16	Proof of 6 employees' salary payment for the last 6 months	NR	NR	R	R	R	NR	NR
17	Declaration that the service provider shall comply with minimum wage regulations as per the Kenya labour laws	NR	NR	R	NR	R	NR	NR
18	Valid copies of insurance covers-contractual liability (500,000), and WIBA (500,000)	R	NR	R	R	R	R	NR
19	Current membership certificate in the security industry association	NR	R	R	NR	R	NR	NR
20	Proof of first aid training for the security staff	NR	NR	R	NR	R	NR	NR
	OVERALL	NR	NR	R	NR	R	NR	NR

NOTES:

T1

1. Audited accounts not available
2. Proof of payment of employees' salary not available
3. Power of attorney not available
4. Bid bond not attached
5. Proof of compliance with minimum wage not available.

T2

1. Audited accounts available only for two years
2. Proof of payment of employees' salary not available
3. Proof of compliance with minimum wage not available

T3

1. Responsive in all attributes of the criteria

T4

1. CR 12 produced in more than 6 months
2. Form of tender is not dully filled
3. Membership of security association invalid
4. No proof of compliance with minimum wage
5. No proof of first aid training
6. Power of attorney not available

T5

1. Responsive in all attributes of the criteria

T6

1. Tax compliance certificate is expired
2. Business questionnaire not filled
3. Page 005 mutilated to cover name and signature of former Principal, page dated 16/05/2022
4. CR 12 not within 6 months

T7

1. CR 12 not available
2. Power of attorney not available
3. Certificate of independent tender determination is not signed
4. No reference letter from the bank
5. Tax compliance certificate not valid

In this category the following 2 bidder proceeded to technical evaluation stage:

T3 Keyforce Security Group Ltd P.O Box 2183-40200, KISII

T5 Pride Kings Services P.O BOX 2577-40100 KISUMU



B) TECHNICAL EVALUATION

In this stage, the bids were analyzed to determine their compliance with technical specifications as per the evaluation criteria set-out in the tender document. The criteria below were used to evaluate the technical responsiveness of the bidders. The bidders were awarded scores as per the attributes of the technical evaluation. The bidders were ranked based on their scores – from the highest to the lowest before they were subjected to financial evaluation

	ATTRIBUTES OT THE CRITERIA	MAXIMUM MARKS	T3	T5
1	Company Profile and Organizational chart	5	5	5
2	Coverage in Kenya – County Offices	10	10	10
3	Recommendation Letters and references	10	5	5
4	Relevant service orders/contracts with values of at least Kshs. 200,000	5	3	4
5	Relevant certifications and/or trainings	10	0	10
6	CV of key personnel	6	6	6
7	Valid certificates of good conduct for at least 10 staff members	10	10	10
8	Operational Plan addressing all aspects outlined in the schedule of requirements	15	15	15
9	Clear demonstration of intention to provide rapid response services	5	5	5
10	List of motor vehicles fitted with alarm systems for the purpose of rapid response	5	5	5
11	List of relevant portable/handheld security equipment owned/hired and available for supply	5	5	5
12	Valid licences issued by the Communications Authority of Kenya for VHF and UHF Radios	2	0	2
13	Details of veterinary doctors who administer vaccination and health management of security dogs	2	2	2
14	A signed declaration of non-disclosure of information	5	3	3
15	Proof that complete uniforms shall be worn by all uniformed members of the security company	5	5	5
	TOTAL MARKS	100	79	92

The contract will be awarded on the basis of the lowest evaluated bidder with a minimum score of 70%

C) FINANCIAL EVALUATION

In the financial evaluation, the bidders were ranked as follows:

1. T5 Pride Kings Services P.O BOX 2577-40100 KISUMU
2. T3 Key force Security Group Ltd P.O Box 2183-40200, KISII

Professional opinion

The professional opinion by the procurement officer recommended an award to the Applicant (***pride kings***).

However, the accounting officer awarded ***Key force security*** stating that the applicant did not serve well.

Notification of award letters dated 20th June, 2023 to the successful and unsuccessful bidders with specific reasons were provided.

An extract of notification letter to the applicant stated that;

"You were not awarded based on the past performance in the same institution and as the available reports from the internal security officer."

REQUEST FOR REVIEW NO. 53/2023

The Request for Review Was Lodged by M/S PRIDE KINGS SERVICES LTD through Chepkemboi Phyllis & Associates on 3rd August, 2023 for the provision of Security Services (KNP/T/19/2023-2024/5).

The Applicant seeks for the following orders that:

1. **The letter of award arising from the tender for provision of security services, Tender No. KNP/T/19/2023-2024/25 (hereinafter the "tender") for Kisii National Polytechnic be annulled;**

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- 2. The alleged past performance of the applicant be declared a nullity and be struck off;**
- 3. The subject tender be awarded to the applicant.**
- 4. Costs of this application be awarded to the applicant; and**
- 5. Any other orders that the Honorable Board may deem just and fit.**

The Board considered the parties pleadings, documents, written and oral submissions, the list and bundle of documents together with the confidential documents submitted by the Respondent to the Board pursuant to Section 67 (3) (E) of the Act and found the following issues for determination in the request for review in No. 53 of 2023

Whether the Respondent breached Section 3 of the Public Procurement and Asset Disposal Act, 2015 as alluded by the Applicant (hereinafter referred to as the "Act")

The Applicant stated that the Procuring Entity breached section 3 of the Public Procurement and Asset Disposal Act, 2015 for allegedly stating that the applicant had unsatisfactorily performed in a previous contract and yet there they did not conduct any performance review of the said previous contract or communication thereof has ever been communicated to the applicant.

In response, the Respondent averred that before the deadline of the submission of tenders various companies submitted their bids.

That going through the entire procurement process and the evaluation reports the exercise was fair and competitive since the set-out criteria was followed as per Section 80(3).

That two companies made it to financial and they had a tie in quotes per guard which was a determining factor, but since the evaluation committee could not be able to draw decisions on who could be recommended for award, they decided to go for due diligence which is in line with the PPADA 2015 83.

That in this case it was fortunate that the complainant had an engagement with Kisii National Polytechnic and therefore the report from the internal security prompted the committee to opt for Key force than Pride kings who are the complainants.

In buttressing this particular ground, the board observed and referred provision of the Public Procurement and Asset Disposal Act, 2015

In the Standard Tender Document Clause 7 under Section III (Evaluation and Qualification Criteria) on a post qualification and contract award provided that;

(a) In case a tender was subject to post qualification, the contract shall be awarded to the lowest evaluated tender subject to confirmation of prequalified data if so required

Section 83. Post-qualification

(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.

(2) The conduct of due diligence under subsection (1) may include obtaining confidential references from persons with whom the tenderer has had prior engagement.

(3) To acknowledge that the report is a true reflection of the proceedings held, each member who was part of the due diligence by the evaluation committee shall—

(a) initial each page of the report; and

(b) append his or her signature as well as their full name and designation.

Section 150. (1) An accounting officer or his or her appointed representative shall be responsible for ensuring that the goods, works and services are of the right quality and quantity.

(2) The head of the procurement function shall be responsible for assisting the accounting officer to confirm the right quality and quantity of goods, works and services have been delivered to the procuring entity and shall issue a certificate of acceptance to the accounting officer except where technical specifications are from another technical department or professionals engaged to work on behalf of the accounting officer.



(3) Where goods, works and services under sub-section (2), are of technical nature and the specifications were provided by a technical department or professionals engaged to work on behalf of the accounting officer, that technical department or professionals engaged to work on behalf of the accounting officer shall be responsible for confirming the right quality and quantity of goods, works or services have been delivered and issue a certificate to the recipient accounting officer

152. Contract monitoring the head of the procurement function shall prepare monthly progress reports of all procurement contracts of the procuring entity and submit them to the accounting officer.

153. Termination of contract (1) Upon the request of the procurement management unit, the accounting officer of a procuring entity may approve the request for termination of contract. the request of the procurement management unit, the accounting officer of a procuring entity may approve the request for termination of contract.

(2) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable on termination

Section 131. of the Act which state that ***"An accounting officer of a procuring entity may conduct competitive negotiations***

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as prescribed where—

(a) there is a tie in the lowest evaluated price by two or more tenderers;

(b) there is a tie in highest combined score points;

(c) the lowest evaluated price is in excess of available budget; or

(d) there is an urgent need that can be met by several known suppliers”.

Section 132 (3) also provides that ***an accounting officer of a procuring entity shall request the identified tenderers to revise their tenders by submitting their best and final offer within a period not exceeding seven days.***

(4) The revised prices shall not compromise the quality specifications of the original tender.

(5) Tenders shall be evaluated by the evaluation committee appointed in the initial process

Regulations 100. (1) also provides that in using competitive negotiations as provided for under section 131 of the Act and in applying the procedure set out in section 132 of the Act, an accounting officer of a procuring entity shall appoint an ad hoc evaluation committee pursuant to section to 46(4) of the Act to negotiate with the bidder on the recommendation of the head of the procurement function.

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84(1) *The head of procurement function of a procuring entity shall, alongside the report to the evaluation committee as secretariat comments, review the tender evaluation report and provide a signed professional opinion to the accounting officer on the procurement or asset disposal proceedings.*

(2) The professional opinion under sub-section (1) may provide guidance on the procurement proceeding in the event of dissenting opinions between tender evaluation and award recommendations.

(3) In making a decision to award a tender, the accounting officer shall take into account the views of the head of procurement in the signed professional opinion referred to in subsection (1)

1. Due-diligence after evaluation but before award.

The Board noted that:

Section 83 (3) of the Act as outlined hereinabove, clearly stipulates the procedure that must be followed in a due diligence process. First, due diligence is conducted after tender evaluation but prior to award of the tender to confirm and **verify the qualifications of the tenderer determined** by the Procuring Entity to be the lowest evaluated responsive tenderer.

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Then, the evaluating committee must prepare a due diligence report **outlining how due diligence was conducted and the findings of the process.** The said report is signed only by members of the Evaluation Committee and the report must be initialed on each page.

In case, the lowest evaluated tenderer is disqualified after due diligence, it must be noted in the Due Diligence Report with reasons. In view of the findings of the report that the lowest evaluated tenderer be disqualified after due diligence, the Evaluation Committee then recommends award to the next lowest evaluated tenderer, ***subject to a similar due diligence process conducted on such tenderer, as outlined hereinbefore.***

The Board noted that no evidence of confidential information on the **qualifications of the tenderer were** obtained by the procuring entity (evaluation committee) to prove on the applicant's past performance was provided. In addition, the due-diligence report provided by the evaluation committee was inconsistent with the requirements of the tender document.

Remarkably Technical Criteria No.3 required 5 recommendation letters of which the applicant scored 5 out of 10 marks as per the evaluation report, an indication of responsiveness.

Instead, the evaluation committee relied only on its own internal security officer's report who provided information that the Applicant had unsatisfactory performance records during the contract implementation.

The decision to **conduct due-diligence only on its own premise is not only biased but also contrary to the provision of Technical Criteria 3 of the Standard tender** document which rewarded the

applicant 5marks score having provided favorable recommendation letters on the Applicant's past performance. It was therefore prudent for the Procuring entity to conduct due-diligence also on the references provided by the applicant.

Notwithstanding, the Board noted that **duly due-diligence process was not performed to the recommended bidder an indication of inconsistency in the award process.**

A cursory look of Section 48 (1) of the Act states that "***An accounting officer of a procuring entity may establish an ad hoc committee known as the inspection and acceptance committee***". Section 48(4) read together with Regulation 35(6) of the Regulations requires that, the inspection and acceptance committee prepare and issue a report, interim or completion of inspection and acceptance certificate and submit to the head of procurement function.

Further, Section 152 of the Act states that "***The head of the procurement function shall prepare monthly progress reports of all procurement contracts of the procuring entity and submit them to the accounting officer***".

Section 150 (3) states that where goods, works and services under subsection (2), are of technical nature and the specifications were provided by a technical department or professionals engaged to work on behalf of the accounting officer, ***that technical department or professionals engaged to work on behalf of the accounting officer shall be responsible for confirming the right quality and quantity of***

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goods, works or services have been delivered and issue a certificate to the recipient accounting officer

Based on the documents submitted by the procuring Entity, the Board noted **that no such record of monthly progress** reports of all procurement contracts of the procuring entity was availed by the Head of procurement function to the accounting officer.

Inspection reports from head of security, detailing the challenges encountered during the contract implementation addressed to the accounting officer was availed.

Communication on the Feedback to the Applicant on one incident vide a letter dated 28th July, 2023 informing the applicant that Ksh.15000 would be deducted from its payment to cater for the stolen item was evident hence ***the applicant might have been aware of the that particular incident if the letter was duly transmitted to them.***

Despite the many assertion reports by the Respondent security officer, *the procuring entity continued with the services of the Applicant until the closure of the contract period without implementing any measures such as termination pursuant to Section 153(2) of the Act upon realizing the unsatisfactory services offered.*

The upshot is that the Procuring Entity was neither objective nor fair in its conduct of the due diligence exercise on the Applicant, in so far as only the respondent internal feedback was used in conducting due diligence

on the Applicant's past performances. This was contrary to the provision of the due-diligence procedure outlined Section 83 of the Act and technical evaluation scores on which the applicant was scored favorably on recommendation letters.

2. Competitive negotiation if there is a tie in the lowest evaluated price

The Respondent having indicated that two evaluated tenderers had a tie in quotes per guard which was a determining factor ought to have considered the provision of Section 131 and 132 of the Act and Regulation 100 of Regulation 2020 which gives ***the accounting officers discretion of undertaking negotiation and allowing tenderers to revise their tenders by submitting their best and final offer*** to be considered in finalizing the award process.

Whether the Applicant tender was properly evaluated in line with Section 79 and 80(2) of the of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as the "Act")

The Applicant alleged that the procuring entity breached Section 79 and 80 of the Public Procurement and Asset Disposal Act 2015 by introducing a criterion not provided for in the tender since the cited reason was not amongst those listed in the tender document.

That the Procuring Entity further failed to communicate the aforesaid unsatisfactory performance on the previous services to the applicant during the impugned procurement process or during the aforesaid previous procurement process.



Section 79. (1) A tender is responsive if it conforms to all the eligibility and other mandatory requirements in the tender documents.

80 (2) The evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and, in the tender for professional services, shall have regard to the provisions of this Act and statutory instruments issued by the relevant professional associations regarding regulation of fees chargeable for services rendered

The Board noted that the eligibility and mandatory documents/requirements are considered at the Preliminary and Technical Evaluation stages after which Financial Evaluation is conducted. Then, the award of a tender is based on the criteria of lowest evaluated responsive tender.

In this regard therefore, a procuring entity conducts a due diligence exercise to verify and confirm the qualifications of the lowest evaluated responsive tenderer, which exercise would be based on documents and qualifications considered during evaluation that met the minimum eligibility and mandatory requirements of the Tender Document

Further, the Board noted that the alleged due-diligence ***was not based*** on documents and qualifications considered during bid

evaluation. Hence the factors considered at the due diligence were not part of the standard tender document/criteria.

Whether the Respondent's Letter of Notification of Award dated 20th June, 2023 issued to the Applicant met the threshold required in Section 87(3) of the Act read with Regulation 82(3) of Regulations 2020;

The Applicant stated that on the Procuring Entity also breached section 87 by notifying the applicant of its bid after being prompted severally; and only sent notification dated 20th June 2023 and stamped at the post office on 21st July 2023. The notification provided belatedly also failed to disclose the successful bidder and the amount of award.

Section 87 ***states that (1) Before the expiry of the period during which tenders must remain valid, the accounting officer of the procuring entity shall notify in writing the person submitting the successful tender that his tender has been accepted.***

(2) The successful bidder shall signify in writing the acceptance of the award within the time frame specified in the notification of award.

(3) When a person submitting the successful tender is notified under subsection (1), the accounting officer of the procuring entity shall also notify in writing all other persons submitting

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tenders that their tenders were not successful, disclosing the successful tenderer as appropriate and reasons thereof.

Based on the availed documents, the Board noted that records of notification of award letters dated 20th June, 2023 to the successful and unsuccessful bidders with specific reasons were provided. **However, letters did not disclose the successful bidder contrary to Section 87(3) of the Act.**

In view of the provisions of Section 87 of the Act read with Regulation 82 of Regulations 2020, the Board observes that an accounting officer of a procuring entity must notify, in writing, the tenderer who submitted the successful tender, that its tender was successful before the expiry of the tender validity period. Simultaneously, while notifying the successful tenderer, an accounting officer of a procuring entity notifies other unsuccessful tenderers of their unsuccessful bids, giving reasons why their own specific tenderers were unsuccessful, disclosing who the successful tenderer is, why such a tenderer is successful in line with Section 86(1) of the Act and at what price is the successful tenderer awarded the tender. These reasons and disclosures are central to the principles of public procurement and public finance of transparency and accountability enshrined in Article 227 and 232 of the Constitution. This means all processes within a public procurement system, including notification to unsuccessful tenderers must be conducted in a transparent manner.

Consequently, it is the Board's considered view that the Applicant's letter of notification of award dated 20th June, 2023 issued by the Respondents

does not satisfy the threshold of Section 87(3) of the Act read with Regulation 82(3) of the Regulation Act 2020

What are the appropriate orders to grant in the circumstance?

We have established that the Applicant's Tender was not evaluated properly in accordance with the Provisions of Section 83 Regulation 82 of 2020 of the Act read together with Article 227 (1) of the constitution of Kenya and the Tender Document.

We have found that the Applicant's Letter of Notification of Award dated 20th June, 2023 failed to meet the threshold required in Section 87 (3) of the Regulations 2020.

The upshot of our findings is that the instant request for review dated 3rd August, 2023 succeeds as herein under;

FINAL ORDERS

In exercise of the powers conferred upon it by Section 173 of the Public Procurement and Asset Disposal Act, No. 33 of 2015, the Board makes the following orders in the Request for Review dated 3rd August, 2023 and filed on 3rd August, 2023:

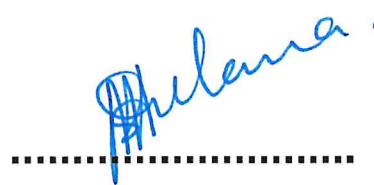
- 1. The Letters of Notification of Award addressed to the unsuccessful Tenders including the Applicant's dated 20th June 2023 in respect to Tender No. KNP/T/19/2023-2024/5 for Provision of Security Services be and is hereby nullified and set aside.**



2. The letter of award issued to the Interested Party dated 20th June, 2023 in respect to Tender No. KNP/T/19/2023-2024/5 for Provision of Security Services be and is hereby nullified and set aside.
3. The Accounting Officer, (1st respondent) is hereby ordered to reconvene the evaluation committee of the 2nd respondent and to re-evaluate all the Tenders submitted in respect to Tender No. KNP/T/19/2023-2024/5 for Provision of Security Services in accordance with the provisions of the Constitution, the law and the pertinent tender document within 14 (fourteen) days of this order and proceed with the tender to its conclusion.
4. Given that the Procurement for the subject Tender is not complete, each party to bear their own costs for review.

Dated at Nairobi this 24th day of August, 2023.


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CHAIRPERSON
PPARB


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SECRETARY
PPARB