REPUBLIC OF KENYA PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 47/2015 OF 21ST SEPTEMBER, 2015

BETWEEN

HATARI SECURITY SERVICES LIMITED..... APPLICANT

AND

UNIVERSITY OF NAIROBIPROCURING ENTITY

Review against the decision of the University Of Nairobi dated 11th September, 2015 in the matter of Tender No. UON/T/06/2015-2016 Tender for Outsourcing of Security Services for University Of Nairobi.

BOARD MEMBERS PRESENT

1. Mr. Paul Gicheru - Chairman

2. Mr. Peter B. Ondieki, MBS - Member

3. Mrs. Josephine Wambua Mon'gare - Member

4. Eng.Weche Okubo - Member

5. Mr.Nelson Orgut - Member

IN ATTENDANCE

Mr. Philemon Kiprop - Holding Brief for Secretary

2. Ms. ShelmithMiano - Secretariat

PRESENT BY INVITATION

Applicant - Hatari Security Services Limited

1. Githinji Mwangi

Advocate

2. Ngugi Mwangi

Advocate

3. Josphat Mwangi

Director

4. Stephen Mwangi

Director

5. John Mwangi

Operation Manager

Procuring Entity - University Of Nairobi

1. Donald Kipkorir

Advocate

2. Ayub Muchohe

Pupil

3. Silas Katam

DPM

4. Mary Kariuki

DPM

5. Joseph Mokaya

Procurement

6. Veronica Muhindi

Procurement officer

7. Jacinta Muthoki

Procurement

Interested Parties

1. Kiplagat C

Advocate, Lavington Security

2. Raymond

Koech

Finance Manager, Lavington Security

3. Musomba J N

Director, Riley Security Services

BOARD'S DECISION

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

BACKGROUND

The Tender was for the Procurement of security Services.

Advertisement

On 5th August, 2015 the university advertised the tenders in the Daily Nation and the Standard Newspapers.

Closing/Opening

The tenders Closed/opened on 19th August, 2015 and Bids were received at the time of closing /opening .The following fifteen (15) firms' submitted bids:

CODE	BIDDER/FIRM
01	911 Kenya Limited
02	Securex Agencies (K) Limited
03	Cobra Security Company Ltd
04	Intercity Security Ltd
05	Riley Services
06	Secure Homes Ltd
07	Total Security Surveillance Ltd
08	Apex Security Services Limited
09	Security Group Kenya Limited

Brinks Security Services Ltd
Bedrock Holding Ltd
Bedrock Security Services Limited
Babs Security Services
Lavington Security Limited
Hatari Security Ltd

Tender Processing:-

A tender processing committee of four people was constituted by the Procuring Entity to evaluate the tenders. The tender processing committee evaluated the tenders as follows:-

Preliminary evaluation

In the evaluation nine (9) of the firms did not meet some of the following Mandatory Criteria and were consequently disqualified at this stage. The reasons given for the disqualifications are as stated below:-

CODE	BIDDER/FIRM	REASONS FOR DISQUALIFICATION			
01	911 Kenya Limited	Did not have a duly filled and signed form of Tender			
		 Submitted audited reports for 2011,2012 and 2013. There was no audited report for 2014 though their year closes in December. There was no evidence of dog ownership No evidence of trained dog handler/ dog master 			
03	Cobra Security Company Ltd	 Did not provide evidence of trained dog handler/master No evidence of computerized control room with power back up 			
04	Intercity Security Ltd	There was no evidence that the control room was computerized			

		There was no evidence of trained dog handler/master attached
06	Secure Homes Ltd	 Tax Compliance was expired Attached only two sets of accounts instead of three as required KSIA certificate was not valid Control room was not computerized There was no evidence of trained dog handler/trainer There was no evidence of NHIF Compliance Had only two recommendation letters instead of the required three Had not provided bank recommendation letter
07	Total Security Surveillance Ltd	 There was no evidence of dog handler/dog master There was no evidence of that the control
08	Apex Security Services Limited	Poom was computerized Audited accounts not owned by the auditing firm There was no evidence of dog handler/trainer Had not attached bank recommendation
09	Security Group Kenya Limited	 Submitted audited reports for 2011, 2012 and 2013. There was no audited report for 2014 though their year closes in December. There was no evidence of trained dog handler/master. Had not attached bank recommendation letter.
11	Bedrock Holding Ltd	Confidential Business Questionnaire was not signed
13	Babs Security Services	 There was no evidence of trained dog handler/master. No evidence of radio communication connected to police network No evidence of computerized control room with power back up.

The six (6) firms that met all the mandatory criteria as contained in the tender document proceeded for further evaluation i.e. **Technical** Capability Assessment.

At this stage, the committee set the pass mark at 60 out of the possible 75 marks translating to 80%.

Upon evaluation, three firms met the pass mark of 70%

	CODE	BIDDER/FIRM
02		Securex Agencies (K) Limited
05		Riley Services
14		Lavington Security Limited

On the other hand the following three (3) firms did not meet the pass mark and were disqualified at this stage:-

CODE	BIDDER/FIRM
10	Brinks Security Services Ltd
12	Bedrock Security Services Limited
15	Hatari Security Ltd

The three (3) firms that had met both the Mandatory and Technical Capability proceeded to financial evaluation to determine the lowest evaluated bidder.

The Tender Processing Committee then made Site Visits to the three (3) remaining firms to confirm some of the information contained in their respective bid documents.

The three firms were found qualified as indicated in the table below:-

No.	ITEM	To diam	1 2 2 2 2 2			
10.	1	Indicator	MAX.	BIDDERS		
			SCORE	02	05	144
			JOCORE	02	05	14
1	Responsiveness to Tender	Mandatory	Yes	Yes	Yes	Yes
	University/ Public	requirements				
	Procurement Act					
	Requirement					
2	Responsiveness of Tender to	Conformity to	75	64.25	60.25	69
	University Technical	technical			00.20	
	Specifications and Technical	specifications				
	ability of Tenderer to meet					
	the specific performance					
	targets of the Tender] 			
3	779					
3	·	Financial	15	15	11	12
	Tenderer to meet the	capability				
	Production, delivery and					
	payment terms of Tender					
3	Physical and Administrative	Assessment by	10	10	10	10
	organization of the Tenderer	site visit				
Tatal			100			
iotal	Total score			89.25	81.25	91
Ranki	Ranking			2	3	1
All the three hiddens mad II						

All the three bidders met the pass mark for the Site Visit (see report).

Recommendation

Finally the Committee carried out price comparison on the three (3) firms that it found qualified in every respect and Ms. Lavington Security Limited was found to be the Lowest Evaluated Bidder and hence was recommended for the award of the tender for the provision of external security services at the annual sum of Kshs.88, 263, 360.00.

TENDER COMMITTEE DECISION

The University of Nairobi Tender Committee at its 146th meeting held on 11th September, 2015 discussed and adopted the Evaluation Report presented before it and made the award of the tender for the Provision of Security Services to Lavington Security Services Ltd at a total sum of Ksh.88, 263, 360, 000.00.

THE REVIEW

The Request for Review was been filed by M/s Hatari Security Services Limited, which was represented by the firm of Githinji Mwangi & Associate Advocates in the matter of Tender No. UON/T/06/2015-2016; Tender for Outsourcing of Security Services for University Of Nairobi.

The Applicant was represented by Mr. Githinji Mwangi, Advocate, while the Procuring Entity was represented by Mr. Donald Kipkorir. The Interested party (Successful Bidder) was represented by Mr. Kiplangat, Advocate. During the hearing of the request for review one other interested party M/s Riley Services appeared before the Board and was represented

by Mr. J.N. Musomba. The Applicant sought for the following orders from the Board:-

- a) The Respondent's decision awarding TENDER NO. UON/T/06/2015-2016to the alleged successful bidder be and is hereby set aside and nullified.
- b) The Respondent's decision notifying the Applicant that it had not been successful in TENDER NO. UON/T/06/2015-2016 by way of the letter dated 14th August 2015 be set aside and nullified.
- c) The Board be pleased to review all records of the procurement process (particularly the alleged technical evaluation thereof) relating to TENDER NO. UON/T/06/2015-2016 and establish what criteria was used and if not according to law and the tender document, annul the results of such an evaluation and direct a fresh evaluation of all bids which met the mandatory requirements in accordance with the law and the tender document.
- d) In the alternative, the Board be pleased to substitute the decision of the Review Board for the decision of the Respondent and award the Tender to the Applicant.
- e) The Respondent be ordered to negotiate and sign a contract with the Applicant in accordance with the Tender document and the decision of the Board.
- f) Further and in the alternative, the entire tender process be nullified and the Respondent be ordered to re-tender afresh.

- g) The Respondent be and is hereby ordered to pay the costs of and incidental to these proceedings; and
- h) Such other or further relief or reliefs as this board shall deem just and expedient.

During the hearing of the Request for Review it transpired from the submissions made by Mr. Kiplagat on behalf of the successful bidder that the Applicant had used a name other than the one that the Applicant had used in the submitting it's tender, namely M/s Hatari Security Services Limited when it lodged the request for review instead of it's correct name M/s Hatari Security Guards Limited. Mr. Kiplagat therefore urged the Board to find that under the Provisions of Section 93(1) of the Public Procurement and Disposal Act, the party which had made the application was not a candidate within the meaning of the Act. He therefore urged the board to strike out the Request for Review under the Provisions of the Act which only limits the making of a Request for Review to a candidate in a tender process and not to strangers.

Upon realizing the error in the Request for Review, Mr. Githinji applied for the amendment of the Request for Review and the other accompanying documents to correct the name of the Applicant from M/s Hatari Security Services Limited to M/s Hatari Security Guards Limited. He attributed the error to a number of factors one of which was that the time limited for the filing of the Request for Review necessitated that he drafts the Request for Review in a hurry inorder to beat the deadline set out by the Regulations. Mr. Githinji also attributed the mistake to the letter of notification and the

other documents in which the Procuring Entity had described the Applicant as Hatari Security Services Limited and pointed out one of these letters as the letter of notification appearing at page 38 of the Request for Review where the Procuring Entity had described the Applicant as Hatari Security Services Limited. He stated that this misdescription contributed to the wrong heading of the application and urged the Board not to strike out his application which he stated was competent on the ground of the misdescription in the heading of the application and allow the Applicant to amend the application under the Provisions of Article 159 of the Constitution which allows tribunals to hear disputes without having undue regard to technicalities.

Mr. Donald Kipkorir on the other hand opposed the Applicant's Request for amendment and urged the Board not to allow Counsel for the Applicant to transfer what clearly amounted to negligence by the Applicant to his client. He stated that the mere fact that the name Hatari Security Services Limited had been used in the letter of notification did not give the Applicant legal identity and that the only document that could give legal identity to the Applicant was a Certificate of Incorporation and no more. He submitted that Article 159 of the Constitution only dealt with technicalities but not issues of jurisdiction that went into the heart of the litigation. He described the Applicant's attempt at amending the Request for Review as belated and urged the Board to disallow the same.

Mr. Kiplagat similarly opposed the application for amendment by Mr. Githinji and associated himself with the submissions made by Mr. Kipkorir

on behalf of the Procuring Entity. He referred the Board to paragraph 1 of the statement in support of the Applicant's Request for Review and stated that the Applicant had specifically described the Applicant as a limited liability company and that the Applicant could now not be allowed to amend an affidavit since that was not permissible in law. He further submitted that allowing the Applicant to amend the application for Review at this late stage in the day would amount to the Applicant substituting a party outside the statutory period for the filing a Request for Review namely, Seven (7) days and that the only option which was open to the Applicant was to withdraw the entire Request for Review and file a fresh one in the name of the proper party.

He further stated that the issue of who the proper party was was an issue that goes to the Jurisdiction of the Board to hear a request for review and the issue of who a candidate is in a Request for Review is an elementary issue which could not be wished away. He also concurred with Mr. Kipkorir that the application for amendment had been made too late in the day and would be prejudicial to the successful bidder if it was allowed. He therefore urged the Board to dismiss the Application for amendment as sought by the Applicant.

In a short reply to the submissions made by both Counsel for the Procuring Entity and Counsel for the successful bidder, Mr. Githinji urged the Board to look at all the documents relied upon by the Procuring Entity and more particularly the letter of notification and the evaluation report and it would find that that Procuring Entity had described the Applicant in all the said

documents using the name Hatan Security Services Limited. He in any event urged the Board to find that the Procuring Entity and the successful bidder had not suffered any prejudice as a result of what he described as the misdescription of the parties since they were able to substantively respond to the Request for Review on the merits inspite of the existence of the inadvertent name in the heading of the Request for Review.

The Board has considered the heading of the Request for Review, the submissions made by the parties and the totality of the documents placed before it and finds on the Applicant's own admission that the firm which tendered for the subject project was M/s Hatari Security Guards Limited but not Hatari Security Services Limited which the Applicant named as the Applicant in the Request for Review. The Board has also perused the certificate of incorporation contained in the tender document and finds that it bears the name of M/s Hatari Security Guards Limited. The Board considers that the two are not one and the same thing but additionally finds that the misdescription of the Applicant in the tender document was as a result of an error. This error runs through the Applicant's own tender documents letters of notification and the evaluation report where the names have been used interchangeably both by the Applicant and the Procuring Entity.

The question that the Board therefore needs to ask itself is whether it should allow the Applicant's request for amendment. In considering the request for amendment, the Board finds that the general principle as regards the amendment of pleadings is that such applications should be

freely granted subject to certain exception one of which is that it should not cause prejudice to the adverse party.

It is also trite that an application for the amendment of pleadings can be made at any time before a final judgement is made in a matter.

Counsel for the Applicant candidily conceded that the mistake emanated from him on the basis of reliance on documents supplied to the Applicant by the Procuring Entity and more particularly the letter of notification dated 14th September, 2015. This mistake appears to have run through the evaluation report and the other documents prepared by the Procuring Entity.

The Board has looked at the various documents and finds that both parties are to blame for this state of affairs which runs through a substantial number of the documents lodged by the parties with the Board. It would therefore be in the interest of all parties that the application, the responses and the other documents bear the correct name inorder to enable parties ventilate the merits of the request for review.

The Board has also considered the submissions made by the parties on the merits of the request for review and finds that each of the parties ably presented it's case before the Board inspite of the misdescription in the name of the Applicant and it is the Board's view that allowing an amendment will best serve the interests of the parties and allow them to fully argue their respective cases.

The Board finally find's that the Applicant's counsel fully owned up to the mistake in the misdescription of the Applicant and to strike out the request for review on the face of this admission would amount to punishing the Applicant for a mistake attributable to it's advocate.

The upshot of all the above findings is the Applicant's oral application for amendment is allowed and the Board directs that the heading of the Request for Review, all the responses thereto and anyother document filed with the Board and which refers the name Hatari Security Services Limited shall henceforth be amended to read Hatari Security Guards Limited.

Turning to the merits of the Request for Review, it was the Applicant's case that it met all the mandatory requirements set out in the tender document and that since it was the lowest bidder in terms of price, then it was entitled to be awarded the tender under the Provisions of Section 66 (4) of the Act s at it's price of Kshs. 81, 174, 440.00 which according to the Applicant was the lowest price offered by any of the bidders who participated in the tender process. It was the Applicant's further case that to the best of the Applicant's knowledge, the tender document did not contain the technical evaluation criteria in breach of the Provisions of Section 66(2) of the Public Procurement and Disposal Act. It was therefore the Applicant's case that the Procuring Entity erred in subjecting the Applicant's tender to evaluation using a criteria which was not set out in the tender document.

The Applicant therefore urged the Board to find that in the absence of a technical evaluation criteria containing the scores for each item to be

evaluated, it's tender ought to have been declared as the successful tender and the award of the tender ought to have been made to it on the basis of the mandatory criteria and price without paying regard to any technical aspects.

Turning to the issue of the site visit, it was the Applicant's case that the Procuring Entity only carried out site visits to the sites of three-bidders. He submitted that there was no requirement in the tender document that allowed the Procuring Entity to only visit three bidders out of all the bidders who had taken part in the tender process and that this criteria was discriminatory and unfair and did not promote confidence in the tender process as required by the Provisions of Article 227 of the Constitution and Section 2 of the Act.

Mr. Githinji further submitted that by failing to award the tender to the Applicant, the Procuring Entity did not receive value for money which was one of the objectives set out in the Section 2 of the Public Procurement and Disposal Act (2005) as it had failed to award the subject tender to the tenderer with the lowest price.

Mr. J. N. Musomba who appeared in the matter on behalf of M/s Riley Services Limited supported the Applicant's application though he did not inform the Board whether he also supported the Applicant's submission that the tender be awarded to the Applicant. He however informed the Board that M/s Riley Services Limited had not filed it's own independent request for review.

Mr. Kipkorir on behalf of the Procuring Entity opposed the Applicant's Request for Review and submitted that if any term was excluded or was unclear from the tender document as claimed by the Applicant, then the Applicant ought to have sought for clarification the moment it purchased the tender document but not to wait until the end of the process and then raise a complaint.

Mr. Kipkorir further submitted that the tender document set out the technical specifications from pages 26 to 30 and that the Procuring Entity evaluated each aspect in the evaluation report. He therefore stated that it was not therefore entirely accurate for the Applicant to state that it was the lowest evaluated bidder.

He stated that there were initially 15 bidders who were evaluated but the number reduced to 6 bidders and then finally to 3 bidders after technical evaluation. He submitted that the Procuring Entity thereafter visited the sites of the three bidders who scored 80 marks and above but since the Applicant had not scored above 80 marks, it's site was not visited. He stated that during the evaluation process, all bidders including the Applicant were treated equally and any complaint by the Applicant was not therefore merited.

On the contention that the Applicant should have been awarded the subject tender because it had met the technical requirements and had offered the lowest price, counsel for the Procuring Entity submitted that the Applicant could not have been awarded the tender on that basis since technical evaluation was on integral part of the evaluation of the tender which every bidder had to go through. He therefore urged the Board to reject the said submission and proceed to dismiss the Applicant's request for review.

On his part, Mr. Kiplagat supported the submissions made by Mr. Kipkorir and in addition to raising the issue of the absence of a candidate which the Board has already considered above, Mr. Kiplagat submitted that the Applicant bought the tender document for the tender and had notice of it's contents by at least by 19th August, 2015. He stated that if the Applicant had any complaint on the contents of the tender document, he ought to have raised such a complaint immediately it purchased the tender document but not to wait until it's tender had been declared as unsuccessful and then raise the complaint at the tail end of the process.

He submitted that Clauses 2.11.1 and 2.11.2 of the tender document provided for the eligibility of tenderers both technically and financially and that under Clause 2.24.2 appearing at page 14 of the tender document, the Procuring Entity was required to consider the financial and the technical capacity of the tenderers before awarding the tender. He additionally stated that pages 27 to 30 of the tender document set out the technical specifications to be evaluated.

He submitted that if the Applicant had realized that there were no marks for the technical requirements, it ought to have sought for a clarification from the Procuring Entity which the Applicant did not do or alternatively seek for an addendum or challenge the tender document before the Board.

Mr. Kiplagat relied on the High Court's decision in the case of Republic – vs- The Public Procurement Administrative Review Board & Kenya Railways Corporation (JR No. 92 of 2011) for the proposition that where a bidder who realizes that a tender document is defective yet elects to proceed with the entire tender process to the end cannot later complaint about the defect after he losses the tender.

He also relied on the case of Civicon Limited -vs- Kenya Pipeline Co. Ltd (PPARB No. 26 of 2014 for the same proposition.

Turning to the Applicant's submission that it ought to have been awarded the tender because it had met the mandatory requirements and that it's bid was the lowest bid in terms of price, Mr. Kiplagat submitted that that submission was not correct since the Applicant was also bound to undergo technical evaluation and could not be awarded the tender without being evaluated technically. He therefore urged the Board to dismiss the Applicant's Request for Review with costs.

In a short reply to the submissions made by Counsel for the Procuring Entity and Counsel for the successful bidder, Mr. Githinji learned counsel for the Applicant reiterated that the tender document was defective and that the Applicant was not under any obligation whatsoever to seek for clarification.

He reiterated that there was no requirement in the tender document for a site visit and no marks ought to have therefore been awarded to any bidder on the basis of a criteria that was not set out in the tender document. Asked whether he had pleaded this ground of review, Mr. Githinji stated that he had done so though he did not specifically point out to the Board where he had done so.

The Board has considered the submissions made and the documents placed before it by the parties and finds that the basis of the Applicant's case as argued before the Board was that the Board ought to award the Applicant the tender the subject matter of the Request for Review because, in the Applicant's view, it had met all the mandatory requirements and the financial requirements and asserted that since it was the lowest priced bidder, then it ought to have automatically been awarded the tender. The Board however considers this position to be entirely incorrect since the tender document and the Act require that bidders be evaluated for both the financial and the technical evaluation and awarding the Applicant the tender solely based on the two criteria listed above and leaving out the technical evaluation would go contrary to the Act and the tender document.

The Board has also perused the tender document and finds that the subject tender was advertised on 5th August, 2015 and closed on 19th August, 2015. The Board finds that the Applicant had notice of the tender document at least by 19th August, 2015 including any alleged defects that the Applicant states was omitted from the said document2. The applicant however elected to participate in the tender until the end of the process when it sought to have the tender awarded to it on the basis that it was the only

entity that met the mandatory requirements and had the lowest price of all the other bidders.

As the High Court has held on several occasions as demonstrated by the case of Republic =vs= PPARB & Another Exparte Gibb's Africa Ltd a bidder who notices a defect in a tender document is obliged to raise such a defect at the earliest possible opportunity but not to wait until the end of the process.

The High Court whose decision is binding on the Board stated as follows at page 10 of the said decision:-

"Finally, it is now well established that judicial review remedies are discretionary in nature. The applicant has admitted that the procurements had different scores for the technical evaluation parameters. They nevertheless went ahead to submit their bid in a procurement process, which in their view, was founded on a flawed document. It is only after they failed to attain the minimum technical evaluation marks that they started complaining. The document had clearly provided room for seeking clarifications but they did not take this opportunity. Even if they had established grounds for review of the decision, I think they would not have been entitled to the orders sought".

This Board restated the same position at page 38 of it's decision in the case of Civicon Limited =vs= Kenya Pipeline Co. Ltd (PPARB 26 of 2014) where it stated as follows:-

"The Applicant in this tender had several options open to it. If any Provision in the tender document was not clear, the Applicant had the option of seeking for clarification using the time window allowed in the Tender documents or challenging the criteria promptly through the filing of a Request for review, essembling a bid through strategic partnership or not tendering on realising it had no capacity or would not qualify".

The Board has also considered the evaluation report prepared by each individual evaluator and finds that each technical aspect that was set out in the tender document was evaluated and marks awarded. The Applicant did not, during the course of it's submissions point out how it was treated differently from any of the other tenderers and it's main complaint was that no scores were assigned to the individual items of evaluation.

The Board has also considered the Applicant's original tender document and finds that the Applicant provided documents setting out it's experience and including other information which were geared towards proving it's technical qualifications. The Applicant could not have provided the said documents if it intended that the Procuring Entity does not use the same in weighing its technical ability.

The Board therefore finds that the Applicant was not in any way prejudiced as it was treated in the same manner just like the other bidders.

On the issue of the site visit, the Board has perused the request for review and finds that the issue of the site visits was not pleaded by the Applicant. The Board has also perused the minutes of the site visits and finds that the

Procuring Entity only conducted site visits of the three bidders who

attained 80 marks and above but not all the bidders. Having failed to

attain the minimum Eighty (80) Marks, the Applicant could not expect the

Procuring Entity to conduct a site visit on it's premises.

FINAL ORDERS

Inview of all the foregoing findings and in the exercise of the powers

conferred upon it by the Provision of Section 98 of the Act, the Board

makes the following orders:-

a) The Applicant's Request for Review dated 21st September, 2015

lacks merit and the same is dismissed.

b) The Procurement Process herein to proceed to it's original

conclusion.

c) Each party shall bear it's own costs herein inview of the fact that

the Applicant was successful in the application for amendment.

Dated at Nairobi on this 15th day of October, 2015.

CHAIRMAN

SECRETARY

PPARB

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23

