

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

APPLICATION NO. 35/2017 OF 7th APRIL, 2017

BETWEEN

LAVINGTON SECURITY LIMITED.....Applicant

AND

TEACHERS SERVICE COMMISSION.....Procuring Entity

Review against the decision of the Teachers Service Commission in the matter of Tender No. TSC/T/079/2015-2016 for the provision of Security Services.

BOARD MEMBERS PRESENT

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|--------------------------|------------|
| 1. Mr. Paul Gicheru | - Chairman |
| 2. Mr. Paul Ngotho | - Member |
| 3. Mrs. Josphine Mongare | - Member |
| 4. Mr. Nelson Orgut | - Member |

IN ATTENDANCE

- | | |
|-------------------|-------------------------------|
| 1. Stanley Miheso | - Holding Brief for Secretary |
| 2. Maureen Namadi | - Secretariat |

PRESENT BY INVITATION

Applicant - Lavington Security Limited

1. Stephen Bundotich - Advocate, Kale Maina & Bundotich Adv.
2. Kipkirui Langat - Manager
3. Langat Amos - Pupil, Kale Maina & Bundotich Adv.
4. Jane Jemutai - Intern, Kale Maina & Bundotich Adv.

Procuring Entity – Teachers Service Commission

1. Faith Kaluai - Lawyer
2. Zipporah Mambo - Lawyer
3. Patricia Naeku - Advocate
4. Caleb Ogot - Procurement
5. Ntopipo Loparashao - Student

Interested Parties

1. Elias Maina - Company Investor, Intercity Security Ltd
2. Carol Wambui - Procurement Mngr, Intercity Security Ltd

THE BOARD'S DECISION

The Applicant filed this Request for Review on 7th April, 2017 challenging the decision of the procuring entity to award the subject tender to the successful bidder on the ground that the tender was awarded to the Applicant outside the tender validity period. Counsel for the Applicant submitted that this tender closed/opened on 8th July, 2016. He further stated that under the provisions of Clause 2.13 of the tender document, the tender was valid for a period of 120 days yet the award made to the successful

bidder was made on 28th March, 2017 which was way outside the tender validity period. Counsel for the Applicant therefore urged the Board to find that the award was null and void set it aside also prayed for the costs of the Request for Review inclusive of the filing fees of Kshs. 66,809.

M/s Faith Kaluai who appeared on behalf of the procuring entity conceded that at time the tender award was made to the successful bidder namely on 28th March, 2017 the tender validity period had lapsed. She however urged the Board to find that the lapse of the tender validity period was caused by what she referred to as excusable circumstances one of which was the transfer of the procuring entity's procurement manager which affected the procurement process.

On the issue of costs, Counsel for the procuring entity urged the Board not to condemn the procuring entity to pay costs because the Applicant was still providing security services to the procuring entity and would continue doing so until a fresh tender is floated.

Mr. Elias Maina who represented the successful bidder M/s Intercity Security Services Ltd opted not to make any submissions in this matter which he left to the Board to decide.

The Board has considered the submissions made by all the parties to this Request for Review and finds that it was not in dispute that the tender the subject matter of this Request for Review closed/opened on 8th July, 2016 and that based on the evaluation report which was placed before the Board, the evaluation process for the tender was completed on 24th August, 2016 and a professional opinion given under the provisions of Section 84 of the Act on the same day. Letters of notification were then prepared on 28th March, 2017 though the Board was not told when they were send.

It is clear from the above sequence of events that the letters of notification to the successful and the unsuccessful bidders were prepared after a period of almost 263 days from the date the tender closed/opened which was way outside the tender validity period for this tender.

It is now trite law that under the provisions of the Act, a tender can only be awarded within the tender validity period and where an award is made outside the tender validity period, then the tender award is null and void.

This legal position has been stated in various decisions given by the Board such as the case of **Mbarak Pit Contractors Ltd -vs- Kenya Power and Lighting Company Ltd (PPARB No. 20 of 2009)** where the Board held that a tender award made outside the tender validity period is null and void.

This application therefore has merit and is allowed.

On the issue of costs, the general principle of law is that costs follow the event. In the particular circumstances of this review, the procuring entity either acted negligently or in total disregard of the law thereby forcing the Applicant to approach the Board. The Board therefore finds no reason why the Applicant should not be awarded costs.

In the premises the Board makes the following orders on this Request for Review.

FINAL ORDERS

In view of all the above findings and in the exercise of the powers conferred upon it by the Provisions of Section 173 of the Public Procurement and Asset Disposal Act, the Board makes the following orders on this Request for Review.

- a) The decision of the procuring entity given on 28th March, 2017 awarding Tender No. TSC/T/079/2015 - 2016 for the provision of security services to the successful bidder be and is hereby annulled and set aside on the ground that the award was made outside the tender validity period.
- b) The procuring entity is directed to retender a fresh for the provision of the security services within fourteen (14) days from today's date.
- c) On the issue of costs, the Applicant is awarded costs of Kshs. 150,000 all inclusive to be paid by the procuring entity within fourteen (14) days from today's date.

Dated at Nairobi on this 25th day of April, 2017.


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CHAIRMAN
PPARB


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SECRETARY
PPARB

