

REPUBLIC OF KENYA

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD

REVIEW NO. 34/2012 OF 10TH JULY, 2012

BETWEEN

RACE GUARDS LIMITED.....APPLICANT

AND

EXPORT PROCESSING ZONES AUTHORITY....PROCURING ENTITY

Review against the decision of the Tender Committee of Export Processing Zones Authority in the matter of **Tender No. EPZA/0P/3/2012/2013 for Provision of Security Services.**

BOARD MEMBERS PRESENT

Mr. P. M. Gachoka	- Chairman
Ms. Natasha Mutai	- Member
Mr. Sospeter Kioko	- Member
Amb. Charles Amira	- Member
Ms. Judith Guserwa	- Member

IN ATTENDANCE

Mr. C. R. Amoth - Secretary to the Board
Ms. Judy Maina - Secretariat

PRESENT BY INVITATION

Applicant - Race Guards Limited

Mr. Morris Kimuli - Advocate
Mr. Paul Ndolo - Marketing Manager
Mr. Paul Ouko - Operations Manager

Procuring Entity - Export Processing Zones Authority

Mr. James Kimani - Administrative Executive
Ms. Wanjiru Waweru - Zone Manager

Interested Party - Lavington Security

Rastus Arum - Operations Manager
Bernard Omondi - Supervisor

BOARDS`S DECISION

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

BACKGROUND OF AWARD

Advertisement

Export Processing Zones Authority (EPZA), in a tender notice advertised in the Daily Nation Newspaper on 18th April 2012, invited tender for Provision of Security Services - **Tender No. EPZA/OP/3/2012/2013.**

Closing/Opening:

The date and time for closing / opening of the tender as stipulated in the Tender Documents was 8th May, 2012 at 10.30 a.m. Bidders were invited to attend and witness the opening of the tenders if they so wished. Tenders were received from 4 bidders and were recorded in a tender opening register as shown in the table below:

Table 1: Tender Opening Register

No.	Name of Tenderer
1	Gatearmour Security Services Ltd
2	Race Guards
3	Radar Security Ltd
4	Lavington Security Ltd

EVALUATION

Evaluation/examination of bids was conducted in two stages namely financial and technical evaluation.

TECHNICAL EVALUATION

A tender evaluation committee was constituted by the Acting Chief Executive Officer on 30th April, 2012 comprising of the following Export Processing Zones Authority staff members:

- | | | |
|--------------------|---|-------------|
| 1. Gerald Rukaria | - | Chairperson |
| 2. Peter M Ndara | - | Secretary |
| 3. Boniface Katumo | - | Member |
| 4. Mathew Were | - | Member |

The committee was mandated to carry out technical and financial evaluation for Provision of Insurance Brokerage Services, Provision of Medical Insurance and Provision of Security Services.

The committee held the first meeting on 15th May, 2012 and subsequently evaluation started on 18th May, 2012 and ended on 8th June, 2012. The qualification criteria was that bidders must score a minimum of 70% in the technical evaluation to qualify for the financial evaluation.

Members carried out individual evaluation of the four bidders who had submitted their bids. The individual total and average scores were as tabulated hereafter.

Table 2: Technical Evaluation

Bidder No.	Evaluator				
	1	2	3	4	Average score
S1	62.30	46.00	43.45	68.42	55.04
S2	95.60	66.00	94.20	73.68	82.37
S3	86.90	64.00	76.80	82.46	77.54
S4	86.90	64.00	76.80	82.46	77.62

Based on the mean scores above the bidders were ranked as shown in table 3.

Table 3: Results of the Technical Evaluation

Bidder No.	Mean Score (%)	Rank
S2	82.37	1
S4	77.62	2
S3	77.54	3
S1	55.05	4

On the basis of the criteria that bidders must score 70% and above, it means therefore, that the first three bidders S2, S4 and S3, as per the ranking in table 3, qualified for financial evaluation.

FINANCIAL EVALUATION

The three security firms that qualified for financial evaluation were as outlined below:

- ❖ Lavington Security
- ❖ Radar Security
- ❖ Race Guard

The following table gives a summary of the prices quoted:

Table 4 - Prices Quoted

Company	Cost Per Guard per Month (Kshs)	Remarks
Race Guards	Athi River- Kshs. 11,600.00 Mombasa - Kshs. 11,600.00	N/A
Lavington	Athi River- Kshs. 14,000.00 Mombasa - Kshs. 13,000.00	N/A
Radar Security	Athi River- Kshs. 25,520.00 Mombasa - Kshs. 20,880.00	N/A

Remarks

Race Guards was the lowest at Kshs. 11,600 per guard per month.

Conclusion

The Evaluation Committee submitted the report to procurement section for guidance prior to tender award by the Tender Committee.

THE TENDER COMMITTEE DECISION

The Tender Committee noted that the lowest evaluated bidder was Race Guards Limited at Kshs.11,600 per guard per month for both Athi River and Mombasa offices.

However, the user department, EPZA Management, tabled documents indicating the poor performance of Race Guards Ltd and hence disapproval for contracting of the same company.

The second lowest bidder, Lavington Security Co. Ltd was awarded the tender at Kshs.14,000 per guard per month for provision of security services in Athi River Export Processing Zone and Kshs.13,000 per guard per month for provision of security services at the Export Processing Zone Authority offices in Mombasa.

The Tender Committee's decision was communicated to bidders via letters dated 27th June, 2012.

THE REVIEW

Race Guards Ltd the Applicant herein lodged the Request for review on 10th July, 2012 against the decision of the Tender Committee of Export Processing Zone Authority in the matter of Tender No. EXPZA/OP/3/2012 for the Provision of Security Services at their Athi River and Mombasa offices.

The Applicant was represented by Mr. Morris Kimuli, Advocate while the Procuring Entity was represented by Mr. James Kimani, Administrative Executive. The interested candidate present was Lavington Security represented by Mr. Rastus Arum, Operations Manager.

The Applicant requests the Board for the following orders:-

1. **That the procurement process be terminated.**
2. **That the Board be pleased to substitute its decision with that of the Procuring Entity and award the contract to the Applicant as justice demands.**
3. **That the decision of the Procuring Entity not to award the tender to the Applicant be annulled in whole.**
4. **A declaration that the Procuring Entity was not fair and took into account extraneous and irrelevant considerations in failing to award the tender to the Applicant.**
5. **That the costs of this review be assessed and be awarded to the Applicant.**

The Applicant has raised seven (7) grounds of review which the Board deals with as follows:

Grounds 1 and 5 - Breach of Section 66(4) of the Public Procurement and Disposal Act, 2005, hereafter referred to as "the Act" and Regulation 50(3) of the Public Procurement and Disposal Regulations, 2006, hereafter referred to as "the Regulations"

These two grounds have been consolidated because they raise similar issues related to the evaluation criteria of the tenders.

The Applicant stated that the subject tender was evaluated in two stages namely the technical and financial evaluation stages. It referred the Board to the minutes of the Evaluation and Tender Committees which supported its contention that its bid was successful in both technical as well as the financial evaluations. It further stated that although its bid was evaluated in accordance with the set criteria in the Instructions to Tenderers, the Procuring Entity had failed to award it the tender as the lowest evaluated bidder contrary to Section 66(2) of the Act.

The Applicant argued that the Procuring Entity had failed to award the tender to it even though its bid had the lowest evaluated price contrary to Section 66(4) of the Act and Regulation 50(3) thereto. The Applicant added that the Tender Committee which failed to award it the tender had no authority or mandate to award the Successful Bidder who had not been recommended by the Evaluation Committee. This, the Applicant submitted

was done in bad faith and left room for caprice, indiscretion or whim and was contrary to Section 66(3) of the Act.

In response, the Procuring Entity stated that it had awarded the tender to the 2nd lowest evaluated bidder after the lowest bidder (the Applicant) was disqualified on the ground that it had a poor past performance record in the previous financial year 2011/2012 when it was rendering security services to the Authority.

The Board has carefully examined the documents presented before it and considered the parties submissions. The Board notes the provisions of Section 66(4) of the Act and Regulation 50(3) which provide as follows;

Section 66(4):-

“The successful tender shall be the tender with the lowest evaluated price”.

Regulation 50(3):-

“Tenders shall be ranked according to their evaluated price and the successful tender shall be the tender with the lowest evaluated price in accordance with section 66(4) of the Act.”

From the Tender Evaluation Minutes and Report submitted to the Board, it is noted that the Applicant had qualified in the Technical Evaluation with a score of 77.62 against the Successful Bidder’s score of 77.54. Further, the Board notes that the Applicant’s bid price of Kshs. 11,600p.m. for both Athi River and Mombasa branches was the lowest and was duly recommended by

the Evaluation Committee.

The Board finds that it is clear from the aforementioned Tender evaluation minutes that the Applicant was properly evaluated on the criteria set out in the Instructions to the Tenderers and was the lowest evaluated bidder for the award of the subject tender. Therefore the purported disqualification of the Applicant by the Tender Committee was in breach of Section 66(4) of the Act and Regulations 50(3) and 11(2) (a) of the Regulations respectively

Accordingly, these grounds of review succeed.

Grounds 2 and 3 - Breach of Section 66(2) of the Act

The Applicant stated that the Procuring Entity's decision to reject its bid price and award the tender to the Successful Bidder was based on extraneous considerations which were not set out in the Instructions to Tenderers contrary to Section 66(2) of the Act. It argued that the rejection of its tender by the Procuring Entity came after the Evaluation Committee had completed the evaluation process and recommended the awarding of this tender to the Applicant. It submitted that the Tender Committee changed the recommended bidder, a decision which was an afterthought and without legal basis as it went against the recommendation of the Evaluation Committee.

In response, the Procuring Entity stated that it evaluated all the bids including the Applicant's bid in accordance with the criteria set out in the

Tender Documents and in accordance with the provisions of the Act. However, the Procuring Entity added that the Tender Committee was notified of the past poor performance of the Applicant in executing the security duties during the financial year 2011/2012 which was documented through written letters and internal memo's addressed to the Applicant which it had not responded to.

The Board has looked at the Tender Evaluation Report and the minutes in support thereof and notes that the Evaluation Committee recommended the award of the tender to the lowest evaluated bidder who was the Applicant but the Tender Committee rejected this recommendation and instead used past performance to disqualify the Applicant. The Board notes that this was not part of the set criteria in the Instructions to Tenderers, contrary to Section 66(2) of the Act which provides that "*evaluation and comparison shall be done using only the criteria set out in the Tender Documents and no other criteria shall be used.*"

Therefore, these grounds of review succeed.

Grounds 4 and 6 - Breach of Section 66(3) of the Act

The Applicant argued that the Evaluation Committee's decision not to award it the tender after the conclusion of the evaluation process was unfair and discriminatory. It submitted that the Procuring Entity's decision was not clear and determinate thereby leaving room for indiscretion and bad faith to be applied in the award of the tender contrary to Section 66(3) of the Act.

In response, the Procuring Entity stated that it evaluated all the bidders, including the Applicant, in accordance with the criteria set out in the Tender Documents and in accordance with Section 66(2) of the Act.

The Board notes that Clause 2.25.1 & 2.25.2 of the Instructions to Tenderers provided as follows;

Clause 2.25.1

“Subject to paragraph 2.29 the Procuring Entity will award the contract to the successful tenderer whose tender has been determined to be substantially responsive and has been determined to be the lowest evaluated tender, provided further that the tenderer is determined to be qualified to perform the contract satisfactorily.”

Clause 2.25.2

“To qualify for contract awards, the tenderer shall have the following:-

(a) Necessary qualifications, capability experience, services, equipment and facilities to provide what is being procured.

(b) Legal capacity to enter into a contract for procurement.

(c) Shall not be insolvent, in receivership, bankrupt or in the process of being wound up and is not the subject of legal proceedings relating to the foregoing.

(d) Shall not be debarred from participating in public procurement.”

Based on the foregoing, the Board finds that the Procuring Entity breached Section 66(3) of the Act by subjecting the Applicant’s tender to further evaluation after the conclusion of the evaluation process by the Technical

Evaluation Committee as set out in the Instructions to Tenderers. Further, the Board finds that the Procuring Entity's Tender Committee awarded a tender to the Successful Bidder which was not recommended by the Evaluation Committee, outside its mandate and in breach of Regulation 11(2) (a) which states that *"The tender committee shall not modify any submission with respect to the recommendations for a contract award or in any other respect."*

Therefore, these grounds of review succeed.

Ground 7 - Breach of Section 66(6) of the Act

The Applicant alleged that the evaluation of the tender was done outside the statutory period of thirty days and therefore the Procuring Entity breached Section 66(6) of the Act and Regulation 46 thereto.

In response, the Procuring Entity stated that the award of the tender was done within the tender validity period, although it conceded that there was a delay in the evaluation process which was done outside the thirty days period.

The Board has scrutinized the bid documents and has noted that the subject tender were closed/opened on the 8th May, 2012 and the technical evaluation was completed by 18th June, 2012, ten days outside the statutory evaluation period of thirty days. The financial evaluation was conducted between 18th to 27th June, outside the five days period for financial evaluation as stipulated in the Regulations.

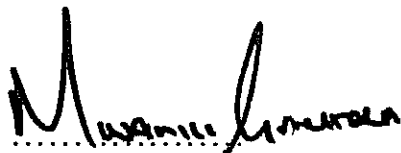
The Board therefore finds that the entire evaluation process took a longer period than the stipulated thirty-five days save that the award of the tender was done on 27th June, 2012, within the tender validity period. This notwithstanding, the Board finds that the Applicant did not suffer any prejudice after the tendering process was concluded within the tender validity period.

Taking into account all the foregoing matters, the Request for Review Succeeds.

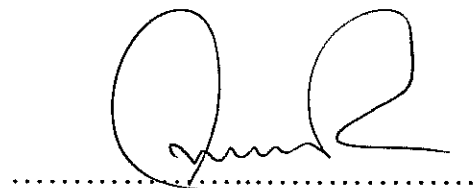
The Board therefore orders, pursuant to Section 98 of the Act, that the award of the subject tender to the Successful Bidder is hereby annulled and the Procuring Entity may proceed to re-tender.

There will be no order as to costs.

Dated at Nairobi on this 1st day of August, 2012.



CHAIRMAN
PPARB



SECRETARY
PPARB

